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United Nations Commission on International Trade Law
Forty-eighth session
Vienna, 29 June-16 July 2015

Possible future work in the area of online dispute resolution

Proposal by Israel

Note by the Secretariat

In preparation for the forty-eighth session of the Commission, the Government of Israel submitted to the Secretariat a proposal in support of future work in the area of online dispute resolution. The proposal was submitted to the Secretariat on 12 June 2015. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

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Annex

Over the last few years, substantial efforts have been made by UNCITRAL Working Group III to develop Online Dispute Resolution (ODR) Rules for online cross-border B2C and B2B transactions. The key issue revolved around the scope of application of the ODR Rules, specifically: whether and how the "arbitration" stage in the Rules can or should apply to B2C disputes where the consumer's home jurisdiction does not recognize pre-dispute arbitration agreements by consumers, and what alternative, if any, would be appropriate. Legal questions surrounding this issue have not yet been resolved and it is unclear whether such resolution is achievable in the near future. Various proposals have been put forward, ranging from limiting the scope of the ODR Rules to closing the Working Group altogether.

While the impasse at the Working Group persists, the need to provide a coherent, fair and efficient legal framework for B2C and B2B cross-border online transactions remains highly relevant, as the volume of cross-border online transactions continues to grow.[1] While acknowledging the continued relevance of proposals for ODR Rules still on the table and the work achieved so far by the Working Group, a new approach is warranted in order to address this need. Therefore, rather than terminate the activities of the Working Group or revert again to the Working Group for deliberation on the outstanding issues, it is suggested to shift the focus away from the ODR Rules and to direct the Working Group's efforts to one or more aspects of online dispute resolution other than procedural ODR Rules.

To that effect, and without precluding other possible areas of work for the Working Group, it is proposed that the Commission, at this time, instruct the Working Group to develop a non-binding instrument for use by ODR providers and neutrals in order to assist and support ODR practitioners. This instrument could address various agreed-upon issues, both with respect to the general functioning of ODR providers (independence, transparency, selection of qualified neutrals, etc.) and to case management (roles and responsibilities of neutrals, handling of evidence, communication with the parties, etc.). By enhancing the reliability, impartiality and efficiency of ODR proceedings, such an instrument would contribute to the protection of the businesses and consumers involved. The instrument could draw from previous deliberations of the Working Group on this matter, as well as from the input of leading practitioners in the field.

As with existing instruments that cover comparable matters, such as the UNCITRAL Notes on Organizing Arbitral Proceedings,[2] this instrument would make clear that it does not impose any legal requirement or substantive norms binding on ODR administrators, providers, neutrals or the parties to the dispute. An ODR provider or neutral could refer to this instrument at its discretion and to the extent it sees fit, using it as a practical toolkit for developing appropriate internal mechanisms and handling ODR cases. In addition, this instrument could enable ODR providers to signal their commitment to applying a non-exclusive set of

[1] UNCTAD, Information Economy Report 2015 – Unlocking the Potential of E-Commerce for Developing Countries (http://unctad.org/en/PublicationsLibrary/ier2015_en.pdf), p. 30.

[2] Revision of UNCITRAL Notes on Organizing Arbitral Proceedings, United Nations Doc. A/CN.9/WG.II/WP.187.

recommended practices endorsed by UNCITRAL, which is recognized as the core legal body of the United Nations in the field of international trade law.

Such an instrument would not purport to resolve the complex scope of application and choice of law questions that were raised in the course of discussions regarding the ODR Rules and would therefore steer clear from the differences in approach concerning B2C disputes, including in regards to arbitration and non-binding recommendations.

As such, the mandate to develop this instrument would allow the Working Group to address the use of ODR in B2C and B2B cross-border transactions more generally, and would enable UNCITRAL to provide a coherent framework for an important and rapidly emerging field of activity. In essence, despite the shift in emphasis, this would merely present a different application of the original mandate of the Working Group.[3]

It should be noted that pursuing this suggested direction would not preclude revisiting the possibility of working on ODR Rules in the future.

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[3] Report of the United Nations Commission on International Trade Law, 43rd session, United Nations Doc. A/65/17, para. 257. The mandate, determined in 2010, reads as follows: "*After discussion, the Commission agreed that a working group should be established to undertake work in the field of online dispute resolution relating to cross-border e-commerce transactions, including business-to-business and business to-consumer transactions. It was also agreed that the form of the legal standard to be prepared should be decided by the working group after further discussion of the topic.*"

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Possible future work in the area of online dispute resolution

Proposal by Colombia, Honduras and the United States of America

Note by the Secretariat

In preparation for the forty-eighth session of the Commission, the Governments of Colombia, Honduras and the United States of America submitted to the Secretariat a proposal in support of future work in the area of online dispute resolution. The proposal was submitted to the Secretariat on 19 June 2015. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

* Reissued for technical reasons on 24 June 2015.

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Annex

After five years of meetings, Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) remains at an impasse arising out of fundamental differences in approach among States regarding protection of consumers in cross-border electronic commerce transactions. We consider it very important, however, that the Working Group produce a tangible work product that (a) supports in general the use of online dispute resolution and (b) provides useful information on good practices in online dispute resolution in a factual and balanced manner. Accordingly, we propose that the Commission direct Working Group III on Online Dispute Resolution (ODR) to prepare Notes on Organizing ODR Proceedings. Such Notes would be similar in nature to the Notes on Organization of Arbitration Proceedings that will be reviewed at the current session of the Commission.[1] In short, we are proposing a shift in the focus of Working Group III in order to try to achieve a tangible and useful conclusion within a reasonable period of time.

Over the years, the Working Group has worked diligently to understand the different perspectives regarding online dispute resolution and to pursue agreement on model procedural rules. The status of the negotiations in Working Group III is described in the Annotations to the Provisional Agenda as follows:

> The Commission may wish to note in particular that at those sessions, the Working Group worked towards a single set of rules for the resolution of online disputes, on the basis of various proposals made during the sessions themselves. However, no consensus was reached on resolving fundamental differences remaining between States that allowed binding pre-dispute agreements to arbitrate and those that did not, despite the Working Group's strenuous efforts to this end. Accordingly, it was said that the Commission should terminate the mandate of the Working Group, also bearing in mind the Commission's earlier decisions on the allocation of UNCITRAL's resources (see under provisional agenda item 18 below). Other delegations expressed the view that the Working Group should continue to seek consensus on both existing approaches and new elements. The Working Group was also invited to engage in informal consultations before the forty-eighth Commission session to seek progress on these issues (A/CN.9/827, para. 15, and A/CN.9/833, paras. 16 and 17).[2]

We agree with the assessment that it will not be possible to reach a consensus on a single set of procedural rules for online dispute resolution in a reasonable period of time, in particular, in light of the significant disagreements among nations regarding laws or policies relating to consumers.

As the Commission noted in establishing the ODR Working Group, "issues relating to consumer protection were difficult to harmonize, since consumer protection laws

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[1] Revision of UNCITRAL Notes on Organizing Arbitral Proceedings, United Nations Doc. A/CN.9/WG.II/WP.187.

[2] Provisional agenda, annotations thereto and scheduling of meetings of the 48th Session, United Nations Doc. A/CN.9/824, para. 26 (emphasis supplied). See also Report of Working Group III on its February 2015 Session, United Nations Doc. A/CN.9/833, paras. 16-17.

and policies varied significantly from State to State."[3] Historically, UNCITRAL and the other private international law bodies have been unable to agree on the application to consumers of a wide variety of private international law instruments, including on instruments concerning international contract law, choice of law, the recognition and enforcement of judgments, and jurisdiction. In these private international law negotiations, disagreements over consumer law issues have been dealt with in one of two ways: (1) providing in the instrument that nothing can override any provision of law from which the parties cannot derogate,[4] or (2) excluding business to consumer transactions from the scope of the instrument.[5] For example, the newly adopted Hague Principles on Choice of Law in International Contracts (2015) provides that "[t]hese Principles apply to choice of law in international contracts where each party is acting in the exercise of its trade or profession. They do not apply to consumer ... contracts."[6] The Official Commentary explains that "[t]he scope of application of the Principles is confined to commercial contracts because in these contracts party autonomy is widely accepted." The Commission will consider whether to endorse the Hague Principles at its upcoming session.

This course of action concerning the treatment of consumer issues has not proven to be acceptable in Working Group III, in part because of the high percentage of low value cross-border transactions involving consumers.

We nevertheless would like the Working Group to try to achieve a practical and useful product within a reasonable period of time, especially in view of the many years of discussions and learning that has been accumulated with respect to online dispute resolution within this Working Group. We also think that it is important for UNCITRAL to adopt an instrument in some form that will promote the use of ODR in international commerce and promote international good practices. As we have stressed several times, a key component in enhancing the use of cross-border e-commerce for micro, small and medium-sized enterprises, is access to justice through ODR.[7]

In light of the impasse, we believe that the best way forward would be for Working Group III to shift its focus from drafting rules of procedure to drafting Notes on the Organization of ODR Proceedings, similar to Notes on the Organization of Arbitration Proceedings that will be reviewed at the current session of the Commission. The ODR Notes would be for use by ODR platforms, providers and practitioners. Consistent with the Notes on Organizing Arbitral Proceedings, the Notes for ODR proceedings would not reflect any practice as "the best practice" or

[3] Report of the United Nations Commission on International Trade Law, 43rd Session (21 June-9 July 2010), United Nations Doc. A/65/17, para. 255.

[4] See e.g., the UNCITRAL Arbitration Rules (Art. 1(3)); the UNCITRAL Conciliation Rules (Article 1(3)).

[5] See e.g., the Convention on Contracts for the International Sale of Goods (1980) (Art. 2); the United Nations Convention on the Use of Electronic Communications in International Contracts (Art. 2); the Hague Convention on Choice of Court Agreements (2005) (Art. 2); the Hague Principles on Choice of Law in International Contracts (2015) (Art. 1).

[6] Hague Principles on Choice of Law in International Commercial Contracts art. 1(1), March 19 2015, www.hcch.net/upload/conventions/txt40en.pdf (emphasis added).

[7] See Proposal by the Governments of Colombia, Honduras, Kenya and the United States at the last session of the Commission, United Nations Doc. A/CN.9/817 at 2-3.

seek to resolve the fundamental differences among countries on consumer protection.

Drawing from the Notes for Arbitration Proceedings, the ODR Notes could make clear that they do not impose any legal requirement binding on the ODR administrators, providers, neutrals or the parties. An ODR provider or neutral could refer to the ODR Notes at its discretion and to the extent it sees fit, and need not adopt, nor provide reasons for not adopting, any particular element of the Notes. The Notes would not be suitable for use as ODR Rules since they would not establish any obligation on the platform, provider or the parties to act in a particular way. Thus, the ODR Notes would be able to avoid the differences in approach concerning consumer law.

We believe that the ODR Notes would be very helpful in promoting the use of ODR and in providing guidance to ODR administrators, providers, and neutrals. The Notes, like the UNCITRAL arbitration notes, could address important matters for ODR such as:

- Use of stages in ODR (e.g. including a preliminary negotiation state where the buyers and sellers negotiate directly through a messaging platform and a facilitated negotiation stage)
- Discretion in the conduct of proceedings and usefulness of timely decisions on organizing proceedings
- Language of the proceedings
- Confidentiality and transparency of information
- Routing of electronic communications (including among the parties and the neutrals)
- Electronic means of sending documents
- Evidence to be considered
- Use of online hearings
- Fees, costs and deposits in respect of costs

We further note that the proposal would be consistent with the original mandate of the Commission. In establishing the Working Group, the Commission did not specify that any specific form of the legal instrument be developed or that the focus be on low value disputes.[8]

For now, we believe that development of ODR Rules may be best left to regional organizations. We also note that the United Nations Conference for Trade and Development (UNCTAD) is negotiating a resolution on consumer protection for the General Assembly that would revise the United Nations Guidelines on the Protection of Consumers and vest oversight over these issues in a body under UNCTAD. The new Guidelines encourage the development of fair, effective and transparent mechanisms to address consumer complaints, including for cross border transactions, through alternate dispute resolution.

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[8] Report of the United Nations Commission on International Trade Law, 43rd Session (21 June-9 July 2010), UN Doc. A/65/17, para. 257.